IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

The City of Mitchell,
Appellant.
vs.
Dakota Central Telephone Company,
Respondent.

APPELLANT'S BRIEF

ABSTRACT OR STATEMENT OF THE CASE

This is an equity suit and was originally instituted by the Dakota Central Telephone Company as complainant against appellant, in the United States District Court for the district of South Dakota, for the purpose of securing an injunction against appellant restraining it from in any manner other than by the exercise of lawful police power, interfering with the poles, telephone lines and telephone exchange owned and operated by complainant in appellant city. Issue was duly joined in said action by appellant serving and filing its answer to complainant's Bill of Complaint. The cause was submitted to the District Court, Judge Wilbur F. Booth of St. Paul, Minnesota, presiding in place of Judge James D. Elliott, upon certain stipulations of fact
2 agreed to and upon certain evidence submitted by the respective parties. On the 10th day of September, 1915, the District Court entered its judgment, awarding to the complainant, the relief prayed for. From this judgment the appellant herein prosecutes this appeal.

The complainant in its Bill of Complaint alleges in substance that since August 30, 1904, it has been a corporation under the laws of South Dakota, empowered to purchase, lease, construct and operate telephone lines and exchanges and that under Section 554, Civil Code of South Dakota, it was granted the right of way for telephone purposes over the public grounds, streets, alleys and highways in the State of South Dakota; that said Section 554, Civil Code is as follows:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said line shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

3 That complainant is the owner of and operates a local telephone exchange in eighty-five cities in South Dakota and owns and operates two hundred sixty-five telephone stations, other than exchanges, situated in the States of South Dakota, North Dakota, and Minnesota; that all of such towns and cities are connected by long distance telephone lines owned and operated by the complainant; that on May 11, 1898, the City Council of Appellant City adopted the following Ordinance, known as Ordinance No. 135:

"ORDINANCE NO. 135.

An ordinance granting to F. B. Elce, his associates, heirs, and assigns the use of the streets, alleys and public grounds of the City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system.

Be it ordained by the city council of the City of Mitchell, South Dakota.

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. B. Elce, his associates, heirs and assigns

are hereby granted the right to the use of the streets, alleys, and public grounds of the said City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this
4 ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell, and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Provided, that such poles, wires, and appliances shall not be so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires and other appliances, shall be located as far as possible in the alleys of said city. Provided further that in no case shall the poles, wires and other appliances be placed on Main street, except for the purpose of crossing said Main street upon the streets running east and west. It is also provided that the said city council shall have the right to direct the location of all poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of said City of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval
5 of this ordinance have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs, and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as the business may demand; and the maximum rent for the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty-five cents per month for residence houses, for service within the City of Mitchell; provided, that if the said F. B. Elce, his as-

sociates, heirs, and assigns, shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs and assigns the right and privilege to use the streets, alleys and public grounds, of the said City of Mitchell for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns, shall erect and maintain three telephones at such places as the city council shall
6 direct, and that the said three telephones shall be furnished to the said city during the term of fifteen years without cost or expense to the City of Mitchell; provided also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of two thousand four hundred dollars ($2,400), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars ($2,400), received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the city council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs, and assigns, shall fail to comply with any of the provisions of this ordinance, then the city council of the City of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and
7 revoked; Provided, that due notice of such intention shall be given by the said city council to the said F. B. Elce, his associates, heirs and assigns, and a

reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11, 1898.

THOMAS FULLERTON, Mayor.

Attest: J. K. SMITH,
City Auditor."

That Mr. Elce, the grantee in said Ordinance accepted the same and complied with its terms; that in 1904, the appellant City, upon the application of the Dakota Central Telephone Lines, a corporation, organized under the laws of South Dakota, passed the following ordinance, known as Ordinance No. 174:

"ORDINANCE NO. 174

An Ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles, and fixtures, and to string wires, for the purpose of operating long distance telephone lines, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City
8 of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines (Inc), their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of Mitchell may adopt any reasonable rules and
9 regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, S. D., shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21, 1904.

Approved,

J. L. HANNETT, Acting Mayor.

J. G. MARKHAM, Auditor."

That upon further application of said Dakota Central Telephone Lines, the City Council of Appellant City passed an ordinance known as Ordinance No. 180, which is as follows:

10 "ORDINANCE NO. 180.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc), their successors, or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines (Inc.), their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be
11 located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and with the date of its passage and approval.

12 Passed June 6, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, Mayor.

J. G. MARKHAM, Auditor."

It is further alleged in complainant's complaint that at the time of the passage of Ordinance No. 174 and No. 180, the telephone instruments in general use in telephone exchanges and in the telephone exchanges in Mitchell could not be successfully used for conversations over long distances, but that there had been developed certain telephone instruments known as "long distance telephone" which were furnished to subscribers by special arrangements and could be used for both local and long distance work. That prior to the adoption of Ordinances No. 174 and 180 the Southern Dakota Telephone Company had constructed long distance telephone lines into the City of Mitchell from other cities; that the Dakota Central Telephone Lines in 1903, purchased the property of the Southern Dakota Telephone Company, and in 1904, it purchased the local telephone exchange from F. B. Elce, the grantee in Ordinance No. 135, and the same year all of these properties together with all the franchises were purchased by and transferred to the complainant and the complainant has since that time and now is

13 engaged in operating all of said properties.

The complainant further alleges that in 1907 it desired to install an automatic telephone system in appellant city and to properly install such system it was necessary to build certain underground ways for the wires and cables and upon complainant's application appellant city passed the following resolution, to-wit:

"Be it Resolved, By the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets, alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

That complainant thereupon installed said automatic system and placed all wires in the business section of the city underground, and erected a fire-proof building, all at a cost of $110,000; that by reason of the foregoing, the complainant claims a vested right to maintain and operate said telephone exchange and lines and to protect such rights this suit was instituted; that the complainant now owns and operates long distance telephone lines from the City of Chamberlain on the west,
14 through the City of Mitchell to cities of Marshall and Heron Lake, in the State of Minnesota, and from the cities of Edgely, Lamour and Oakes, North Dakota, on the north, through the City of Mitchell, to the City of Running Water in South Dakota, on the south, that inter-state telephone messages are carried on these lines; that the complainant transmits the United States weather reports to thirty-two cities in the state of South Dakota, and furnishes telephone service to officers of the United States Government at cities and towns where such officers are situated and at the Indian agencies at Ft. Yates, North Dakota, Cheyenne Agency, Yankton Agency and Sisseton Agency in South Dakota.

That the City Council of appellant city, on the 17th day of March, 1913, adopted the following Resolutions, to-wit:

"TELEPHONE RESOLUTION

Whereas, The Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his associates, Heirs
15 and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and maintenance of a Public Telephone System" and adopted the 11th day of May, 1898; and,

Whereas, The rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, The Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, The said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and,

Now Therefore, Be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that the said Dakota Central Telephone Company be, and it is hereby, notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues and public

grounds of the City of Mitchell, South Dakota, all
17 of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zietlow, the president of said company at Aberdeen, South Dakota, and that the city auditor of the city of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zietlow in accordance herewith; and,

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

18 Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

"FIRE ALARM RESOLUTION

Whereas, the rights of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Conucil of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

Be it further resolved that the City Engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

19 "TELEPHONE RESOLUTION

Whereas, the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system, in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and,

Whereas, the City Council of said city is desirous of protecting its rights in said matter.

Now therefore, to protect its said rights and to avoid waiving said rights.

Be it Resolved, by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March,
20 1913, that all the officers and employees of the said City of Mitchell, South Dakota, be and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service from said

company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have been adjusted, and that they are further directed and requested to terminate, on the said 11th day of May, 1913, all relations existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

That the appellant city threatens to remove the local telephone exchange of the complainant from the city; that said resolution apply to the complainant alone and that appellant city threatens to prevent by force and by legal proceedings the complainant from operating, extending and renewing its said telephone lines and exchanges within appellant city.

Complainant further claims that the resolu-
21 tions above set out had the force and effect of a law of the State of South Dakota within the intent and meaning of Section ten, Article One, of the United States Constitution, and that such resolution is a law which impairs the obligation of the contracts arising between the complainant and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant, its charter rights, and the consent of the City of Mitchell to the construction of the telephone lines and exchange in said city.

That the value of complainant's telephone exchange and lines situated in the City of Mitchell consists largely in labor and for the city to require complainant to remove such lines and exchanges will deprive complainant of its property without due process of law and will amount to a confiscation thereof in violation of the Fifth Amendment to the Constitution of the United States, and will interfere with complainant's inter-state business.

DEFENDANT'S ANSWER

The defendant in its answer admitted the corporate character of complainant, denied any knowledge of the

extent of complainant's business and denied that complainant acquired any rights in the streets of defendant city, by virtue of Section 544 of the Civil Code of the State of South Dakota, and averred that all the rights that complainant had in said streets were derived
22 from said Ordinances Nos. 135, 174 and 180, and that subject to the rights therein granted, the defendant had exclusive control of its streets. The defendant admits the passage of Ordinances No. 135, 174 and 180, and admits that the Southern Dakota Telephone Co. long prior to the passage of Ordinances No. 174 and 180 had built long distance telephone lines into the City of Mitchell but denies that said company had secured any permission thereto from said City and avers that the complainant had no other consent for long distance telephone lines in said city, than as granted in said Ordinances Nos. 174 and 180. Defendant further denies that the instruments in use in the local exchange at Mitchell at the time complainant purchased it could not be successfully used for long distance conversation. The defendant further admits that the Dakota Central Telephone Lines on May 25, 1904, entered into a contract for the purchase of Elce's interest in the telephone exchange erected and operated under Ordinance No. 135, but denies that said company relied upon the consent given in Ordinance 174.

It is also admitted that Complainant in 1904 became the purchaser of all of the telephone properties constructed in said city under Ordinances Nos. 135, 174 and 180, and all of the rights, privileges and obligations conferred and imposed by said ordinances.

Defendant further denies that complainant
23 had acquired any vested rights to operate a local exchange in said city, except as granted in Ordinance No. 135 and that this right expired May 11th, 1913.

The defendant further denies any knowledge of complainant's long distance telephone business, its interstate character, its relation with the United States Weather Bureau and Indian Agencies and officers; denies that defendant has ignored or disregarded any vested rights of the complainant or that it will ignore or disregard the laws of the United States or of the State of South Dakota, or that it will interfere with complain-

ant's inter-state telephone business, and avers that the sole purpose of passing the telephone resolution of March 17, 1913, was to give complainant timely notice of the termination of its rights to operate a local exchange under Ordinance 135, and to exclude its local exchange from the said City after the expiration of Ordinance No. 135. The defendant further denies that the resolution of March 17, 1913, was intended to apply to complainant's long distance telephone lines operated under Ordinances Nos. 174 and 180, and denies any intention to interfere with such long distance telephone lines. The defendant further denies that the resolution of March 17, 1913, has the force of a law impairing the obligation of any contract between complainant and defendant or that it will in any manner impair any vested rights of the
24 complainant. The defendant further denies that anything done or threatened to be done by the defendant will impair any contract between complainant and defendant or any of its property rights or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights had become vested in complainant by virtue of any acts of the defendant which will in any way be impaired by the things done or threatened to be done by the defendant.

The defendant further alleges that complainant in 1904, purchased the local telephone exchange and franchise of F. B. Elce, the grantee in Ordinance No. 135, and has owned and operated same under the terms and conditions of said Ordinance No. 135, and that the complainant for a long time after the passage of Ordinance Nos. 174 and 180 made no claim that it was operating its local exchange under these ordinances, but that it complied with all the terms and conditions of Ordinance No. 135 and from 1904 until 1910, except for the year 1907 and 1908, complainant paid to defendant city the ten per cent gross earnings required by Ordinance 135, that it furnished the defendant city with three free telephones, complied with the rates prescribed in said Ordinance No. 135, and paid the said ten per cent on the gross earnings

for the year 1907 and 1908 under a judgment of
25 the Supreme Court of the State of South Dakota;

The defendant further alleges that before complainant incurred any expense in building its exchange building and installing its automatic system notice was served upon complainant by defendant that its rights to maintain an automatic local telephone exchange would terminate with the expiration of Ordinance No. 135, on May 11, 1913. The defendant further alleges that at all the times covered by the Bill of Complaint, the complainant has been owning and operating two separate and distinct telephone systems and exchanges in the defendant city, to-wit: A local exchange whereby residents of the city are enabled to communicate with each other at a flat rate per month, and a long distance system whereby residents of the city can communicate with people residing outside and at a distance from the city, and that such service is paid for according to distance the message is transmitted and the length of time consumed in sending it, and that the local exchange was constructed, owned and operated under the terms of Ordinance No. 135, while the long distance system was owned and operated under the terms of Ordinances No. 174 and 180.

The defendant further alleges that the respective rights of the parties, the validity, scope, effect and
26 construction of Article X, Section 3, of the South

Dakota Constitution, Subdivisions 7, 9, 10 and 17, of Section 1229 of the Revised Political Code of the State of South Dakota, and of Section 554 of the Revised Civil Code of 1903, of South Dakota, and of Ordinances No. 135, 174 and 180, and of the resolution passed and adopted by the City Council of defendant city on the 10th day of April, 1907, had all been determined and adjudicated in favor of the defendant city, by the Supreme Court of the State of South Dakota, in a decision rendered September 22, 1908, in a suit by the defendant City against the complainant for the collection of the ten per cent gross earnings for the years 1907 and 1908, provided for by Ordinance No. 135, and that one of the main defenses in that action was that the complainant here was not operating its said local telephone exchange under Ordinance No.

135, but was operating it under Ordinances No. 174 and 180, and the resolution of April 10, 1907, and that said Ordinance No. 135 had been repealed and superseded by said Ordinances No. 174 and 180, and the resolution of April 19, 1907.

The defendant further challenges the jurisdiction of the United States District Court over the matter in controversy on the ground that there is no diversity of citizenship between the parties herein, and that
27 the matters in this controversy do not arise under the constitution or laws of the United States, and that it appears upon the face of the Bill of Complaint that the determination of the rights of the respective parties do not involve any title, right, privilege or immunity conferred by the constitution or laws of the United States, or that will be defeated by a construction of the constitution or laws of the United States, and that the suit does not arise under any law regulating interstate commerce.

The foregoing sets out the main contention of the respective parties as developed in the pleadings.

The main points in controversy are as follows:

1. The jurisdiction of the United States District Court to hear and determine the matters in controversy.

2. The scope and interpretation to be placed upon Ordinances No. 174 and 180 as heretofore set out.

3. Whether or not the matters in controversy herein is res adjudicata so as to be binding upon the United States Courts, and

The cause was submitted upon certain stipulated facts and certain evidence taken in the form of depositions and submitted at the trial, and certain questions of evidence were raised, which questions are shown in the following specifications of error.

28 SPECIFICATIONS OF ERRORS

The appellant specifies the following errors upon which this appeal is predicated:

FIRST

That the United States District Court for the District of South Dakota erred in taking and entertaining

jurisdiction of this suit; that said court did not have jurisdiction to hear and determine the same for the following reasons:

(a) Because the Resolution of the defendant City of March 17, 1913, the enforcement of which the plaintiff seeks by this suit to enjoin, is not a law and did not, and does not have the force or effect of a law of a state, impairing the obligations of a contract, within the meaning of Section 10, Article 1, of the Constitution of the United States.

(b) The Supreme Court of the State of South Dakota has considered and decided that a resolution of a city council in said state, is not of equal dignity with and does not operate as a repeal of, an ordinance enacted by a city council, and such decision is conclusive of this question and binding upon the Federal Courts.

The resolution herein referred to is as follows:

29 "TELEPHONE RESOLUTION.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135, of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the City of Mitchell,

South Dakota, for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate
30 a local telephone system or exchange in the City of Mitchell, South Dakota; and

New Therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Cen-
31 tral Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be

necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the president of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance herewith; and,

Be it further resolved that the mailing of a
32 copy of this resolution by the City Auditor to the President of said Company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

SECOND

The District Court erred in adjudging and entering its decree that plaintiff is and since June 7th, 1914, has been rightfully and lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines (Inc.), by Ordinance No. 180, of the defendant City, two separate and distinct telephone exchanges or systems, one for local and one for long distance or toll lines, or that it acquired any right whatsoever to maintain and operate a local telephone exchange or system within said City under said Ordinance No. 180, for the following reasons:

(a) The sole right and authority of plaintiff to maintain and operate a local telephone exchange or line

within the said defendant City was acquired by
33 and through Ordinance No. 135, of said City, "Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Pubile Telephone System." Passed by the City Council May 11th, 1898; that the franchise and all rights granted by said Ordinance expired by the terms thereof May 11th, 1913.

(b) That said Ordinance No. 180 did not grant to the Dakota Central Telephone Lines (Inc.), under which plaintiff claims, does not and never did authorize the Dakota Central Telephone Lines (Inc.), its successors or assigns, the right to maintain and operate a local telephone exchange within said City.

(c) The plaintiff herein was and is precluded and estopped from maintaining this suit, because of the adjudication by the Supreme Court of the State of South Dakota, in the case of City of Mitchell, et al., vs. Dakota Central Telephone Company, decided May 24th, 1910; 25 S. D. 409, (127 N. W. 582), wherein said Court considered said Ordinance and decided that said Ordinance No. 180 did not repeal Ordinance No. 135, and that said Ordinance No. 135 was for a local telephone system within the defendant City, and that said Ordinance No. 180
only authorized a long distance telephone system
34 within and through said city, and that said construction and decision by said State Court is res adjudicata and conclusive of this question against plaintiff, and it cannot be heard upon the same question in this suit. Said Ordinance No. 180 is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Lines (Inc.), their successors or assigns to erect poles, and string wires

on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception however, not to prohibit the crossing of Main, Park Avenue, Fourth and Fifth Streets, at right angles, where it is necessary, and maintaining the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the City of Mitchell, and the public in general, facilities to communicate with
35 parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintendened by the above company and such wires are not to interfere with
36 the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904; approved June 7th, 1904.

GEO. A. SILSBY, Mayor.

J. G. MARKHAM, Auditor."

(d) It affirmatively appears from the record and is undisputed that notwithstanding said ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinance so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the
37 case of City of Mitchell vs. Dakota Central Telephone Company, supra, and that the rights of plaintiff under said Ordinance, and particularly No. 180 were found and conclusively determined in said action, and the same became res adjudicata of said question, and plaintiff is bound thereby and estopped from urging the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

(e) That plaintiff is precluded and estopped by the decision of said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, from urging in this Court the repeal of said Ordinance No. 135, by the Resolution adopted by the defendant City, April 10th, 1907, because:

1. Said Resolution did not in effect repeal, or pretend to repeal said Ordinance No. 135, but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resoluation did not operate as a repeal

of said Ordinance No. 135 and that decision was
38 and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by Federal Courts.

Said Resolution of April 10th, 1907 is as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances."

THIRD

That said District Court erred in adjudging and entering its decree that said resolution of March 17th, 1913, was and is unconstitutional and void, and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1, of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United

States, for all of the reasons stated in assignments
39 numbered First and Second herein.

FOURTH

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchange now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police power of the defendant city, and unjustly deprives it of the right to impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said City.

FIFTH

The Court erred in admitting the testimony given by N. L. Lane, as hereinafter set out, over defendant's objection that such evidence was incompetent, irrelevant and immaterial in that it is an attempt to construe the meaning of the ordinances involved in this action by oral extrinsic evidence and that the meaning, scope and effect of such ordinance cannot be proved by such evidence. The evidence objected to as above, is as follows:

"When I first engaged in the telephone business the 'Blake Transmitter' was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphram and was found to be an efficient transmitter for transmitting messages a short distance, that is 20, 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the 'long distance' transmitter, or 'solid back.' This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not become general until about 1896, 1897 or 1898 in the entire United States, and in some localities it was in general use before that date. The solid back transmitter was used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them, both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the 'solid back' transmitter than for the old type."

SIXTH

The Court erred in overruling the defendant's objection to the following question asked of M. L. Lane, to-wit:

"Q. With the Blake transmitter what was the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk?"

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case, for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinance in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves. Objection overruled. Exception allowed.

"A. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after installation of the solid back transmitter, the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as the company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation."

SEVENTH

The Court erred in overruling defendant's objection to the following question asked of the witness, M. L. Lane, to-wit:

"Q. Now, this solid black transmitter you
42 have spoken of, what was the trade name by which such instrument was generally known among the telephone people?"

Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect. Objection overruled. Exception allowed.

"A. Long distance transmitter."

EIGHTH

The Court erred in overruling the defendant's objection and in admitting the testimony hereinafter stated as given by Charles E. Hall over the defendant's objection that it was incompetent. irrelevant and immaterial, and for the further reason that no proper foundation has been laid and that it is not binding on the de-
43 fendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances. Objection overruled. Exception allowed. The evidence objected to was as follows:

"The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter was in use in 1884, until June, 1905, more or less; their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889, which would carry messages longer distances than the iron wire. The 'solid back' transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance
44 to talk, but after the solid back transmitter had been furnished, the subscriber was generally able to talk over long distance from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the 'solid back' or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitters. During the

time from 1893 to 1904 the 'solid back transmitter' went under the trade name of 'long distance telephone."

NINTH

The Court erred in overruling defendant's objection to, and in admitting the testimony hereinafter set out as given by J. L. W. Zeitlow over defendant's objection that such evidence was incompetent, irrelevant and immaterial; that it does not tend to prove any of the issues in this case, and that it is in no way binding upon the defendant; that no proper foundation has been laid, and for the further reason that it is an attempt by oral and extrinsic testimony to prove the meaning, scope and effect of such ordinance, and that the language of ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of
45 South Dakota. Objection overruled. Exception allowed.

The evidence objected to is as follows:

"The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges, the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came into general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of 'long distance telephone instruments.' A successful conversation could be heard through the Blake transmitter from a distance of 25 to 100 miles according to the other conditions of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did

not use any other transmitter. I was president
46 of the Dakota Central Telephone Lines Company in 1904."

TENTH

The Court erred in overruling defendant's objection to the following question propounded to J. L. W. Zeitlow:

"Q. How are they classed with reference to long distance telephones or otherwise?"

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness; that it don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action. Objection overruled. Exception allowed.

"A. They are long distance transmitters and telephones. There are approximately between eleven
47 and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called 'long distance' and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party."

ELEVEN

The Court erred in overruling defendant's objection to the following question propounded to the witness John Osteline, to-wit:

"Q. While you were in Minneapolis, were there any Blake transmitters in use at that time."

Mr. Miller: This is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason
that the Supreme Court of the State of South Da-
48 kota, has construed the meaning, scope and effect
of such ordinances contrary to the contention of the plaintiff in this case. Objection overruled. Exception allowed.

"A. No, sir, there was not; not to my knowledge there was not.

The witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmitter" and "Long distance transmitter", and many called it the "solid back."

TWELFTH

The Court erred in sustaining the complainant's objection to the following question propounded to witness, George E. Foster, for the defendant:

"Q. What do you understand by long distance telephone?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. My understanding of a long distance telephone was to connect different towns in different parts of the state, so as to talk with people outside of Mitchell."

49 *THIRTEENTH*

The court erred in sustaining the complainant's objection to the following question propounded to George E. Foster, witness for the defendant:

"Q. That is what you understood by the term 'long distance' telephone at the time of the passage of this ordinance?"

Objected to as incompetent and immaterial and could not be received to interpret the ordinance. Objection sustained. Exception allowed.

"A. That is what I understood."

FOURTEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to A. J. Kings, witness for the defendant:

"Q. You may state what your understanding is of the term 'long distance?'

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. I understand it is a line running from different towns and connecting the different towns in the country."

FIFTEENTH

The Court erred in sustaining complainant's objection to the following question propounded to A. J. Kings, as witness for the defendant:

"Q. Did you so understand the term 'long distance' telephone at the time this ordinance was passed?"

Objected to as immaterial and incompetent.

50 Objection sustained. Exception allowed.

"A. Yes, as connecting different towns around."

SIXTEENTH

The Court erred in sustaining the complainant's objection to the following question asked of defendant's witness, A. J. Kings, to-wit:

"Q. You may state whether or not at the time this ordinance No. 180 was passed, you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of constructing and operating a local exchange in the City of Mitchell, South Dakota?"

Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I did not understand it as a local exchange. We already had one."

SEVENTEENTH

The Court erred in sustaining complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. State what you understand by the term 'Long distance'?"

Objected to as incompetent and immaterial and no foundation laid for it. Objection sustained. Ex-
51 ception allowed.

"A. It is a telephone connection from one town to another."

EIGHTEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. That was your understanding of that term 'long distance telephone' at the time these ordinances were passed, was it?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. That is the way I remember it."

NINETEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. As far as you remember, Mr. Wells, did you intend at the time you voted for these ordinances to grant to the Dakota Central Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?"

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.
52 "A. It wasn't my idea at the time."

TWENTIETH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"A. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone?"

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir."

TWENTY-FIRST

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. What do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. Long distance would be to telephone to places outside of the city—to other towns."

53 *TWENTY-SECOND*

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"A. Was that the understanding you had of the term 'long distance' at the time these ordinances were passed?"

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir, that was my understanding at that time, that it was for long distances to connect with other towns and people at a long distance."

TWENTY-THIRD

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Did you intend as a member of the City Council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local tele-

phone system or exchange within the City of Mitchell, South Dakota?"

Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the
54 ordinances. Objection sustained. Exception allowed.

"A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city."

TWENTY-FOURTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Mr. Silsby, what do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. The facilities for connecting between points or between different towns and cities."

TWENTY-FIFTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Did you understand that if I 'phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?"

55 Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

"A. Generally speaking, I should understand it as between different towns."

TWENTY-SIXTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Was that the understanding you had of 'long distance telephones' at the time you signed these two ordinances I have heretofore mentioned?"

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think it was. That was my understanding at that time."

TWENTY-SEVENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Then as far as you know that was the understanding of the other members of the council, was it not?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained.
56 Exception allowed.

"A. I think that that was the sense of the council."

TWENTY-EIGHTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. In the passing of these ordinances the City Council at the time, as you understand it, did not intend to grant a franchise to the Dakota Central Telephone lines to own and operate a local telephone or exchange in the City."

Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinances.
the ordinances. Objection sustained. Exception allowed.

"A. No, sir."

ARGUMENT

Jurisdiction

The jurisdiction of this Court to entertain this suit necessarily depends upon the Court's answer to the following question: Has the State of South Dakota, or the City of Mitchell enacted any law which tends to impair the obligations of any contract with the plaintiff, or which deprives it of property without due process of law?

It is alleged in the nineteenth paragraph of
57 the Bill of Complaint, that the "TELEPHONE RESOLUTION" set out in the fourteenth paragraph of the Bill, adopted and approved March 17, 1913, has that effect. The allegations of the Bill with reference to the inter-state character of the plaintiff's business are wholly immaterial and irrelevant to the question of jurisdiction because:

1. No question of regulation of inter-state rates or inter-state telephone traffic is in any manner raised by the pleadings.

2. Neither the reasonableness of the rates nor any regulation of inter-state business is called into question.

3. Neither Congress nor the Inter-state Commerce Commission, under any authority conferred upon it by the Inter-State Commerce Act, have assumed to regulate or in any manner control the rates of business of inter-state telephone companies operating in South Dakota.

4. The State of South Dakota has conferred upon its Railway Commission, the power to fix telephone rates in South Dakota, by Chapter 207 of the laws of 1913 (Sec. 20, page 307), and the record discloses that on the 17th day of March, 1913, prior to instituting this suit, complainants applied to the Board of Railway Commissioners to adopt the schedule of rates proposed by complainants, governing complainant's business with-
58 in the the City of Mitchell. *Transcript of Record, page 77.*

What obligation of the City of Contractural right of the plaintiff was violated by said resolution?

The "Telephone Resolution" after recognizing the rights and privileges conferred by Ordinance 135, upon plaintiff's predecessor and after reciting that plaintiff, "has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, granting to said Dakota Central Telephone Company, the privilege to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, for a period of twenty years from and after said 11th day of May, 1913, declares:

"Now, therefore, be it resolved, by the City Council of the City of Mitchell in special session assembled, duly

and regularly called this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913, and

Be it further resolved, that said Dakota Central Telephone Company shall have no right and privilege to construct, operate or maintain a local telephone
59 system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913." *Transcript of Record, pages 74-75.*

Further provisions of the resolution notify and request the plaintiff on and after May 11, 1913, to remove its poles, wires, etc. from the streets and public grounds of Mitchell, and that unless it complies with the provisions of said resolution the defendant "*will take such steps as may be necessary* to secure the immediate removal of said poles, etc."

What more was this resolution than a mere notice to the plaintiff of the expiration of its right to maintain a local telephone exchange in the City of Mitchell, and that it must remove its local telephone equipment on and after May 11th, 1913?

"It is no longer open to question that the by-laws or ordinances of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, *having the force of law within the limits of the municipality,* that it may properly be considered as a law, within the meaning of this Article of the Constitution of the United States."

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142-148. (45 L. R. A., 788-791.

Conceding, as we must, that an ordinance regularly enacted by an incorporated city, has the force of
60 law within the meaning of the Federal Constitution, it is not open to question in South Dakota that a mere resolution adopted by a City Council has the effect to change or repeal an ordinance.

City of Mitchell vs. Telephone Company, 25 S. D., 409-420.

The Supreme Court of South Dakota in that case adopted the rule announced in the text-books, as follows:

"The Act which repeals a law must be of equal dignity with the Act which establishes it, hence, an ordinance can be repealed only by another ordinance and not by resolution or motion."

"A repeal cannot be effected by mere resolution or motion or by a void ordinance, but must be enacted in the manner required for passing a valid ordinance."

That the action of the City Council of defendant city complained of by complainant was a resolution although inadvertently designated as an ordinance in the pleadings, we do not think will be disputed by counsel for complainant. The form and wording of this instrument shows that it is a resolution, it is stipulated that it was a resolution. Transcript of Record, page 74, and the trial judge in his opinion designates it as a resolution. *Transcript of Record, page 51.*

There is a great deal of difference between
61 an ordinance and a mere resolution passed by a city council in South Dakota.

City of Mitchell, et al vs. Dak. Cen. Tel. Co., 25 S. D., 409.

"The yeas and nays shall be taken upon the passage of all ordinances, and for the passage of any ordinance it shall require the affirmative vote of a majority of all the aldermen elect, * * * " Sec. 1209, Revised Political Code of 1903, of South Dakota.

"All ordinances shall be read twice, and there shall be at least one week intervene between the first and second reading; and after thus being passed by the City Council shall, before they take effect, be deposited in the City Auditor for the approval of the Mayor, * * * " "Provided, further, that all ordinances so passed by the council and signed by the Mayor, or passed over the Mayor's veto shall be published at least once in the official newspaper of the city, * * * " "The City Auditor shall record in a book kept for that purpose, together with the affidavit of the publisher all such ordinances so passed and published. * * * They shall be styled: 'Be it ordained by the City Council.'" Section 1213, Revised Political Code of 1903, of South Dakota.

"When by this chapter the power is conferred upon the City Council to do and perform any act
62 or thing, and the manner of exercising the same is not specifically pointed out, the City Council may provide by ordinance the details necessary for the full exercise of such power." Section 1380, Revised Political Code of 1903, of South Dakota.

A mere resolution of the City Council in pursuance of a given power does not meet the requirements of N. D. Rev. Codes, Sec. 2223, that the manner of exercising a given power, when not expressly pointed out may be by ordinance.

Engstad vs. Dinne, 8 N. D. 1, 76 N. W. 292.

It is thus seen that there is considerable difference between an ordinance and a mere resolution. The passage of an ordinance is an exercise of the legislative power while the passage of a resolution is ordinarily an administrative act. The resolutions in question did not and could not have the force and effect of law. They could not be enforced in the manner that a law or ordinance is generally enforced. There was no penalty attached to their violation and if they were disregarded, and legal proceedings were instituted by the city, such proceedings would not and could not be based upon such resolutions or their violation, and in such a suit, such resolutions could not be introduced as evidence to prove the city's contentions, except possibly on the question of estoppel if that were raised. They are therefore
63 nothing more than a mere statement of the City's position on the points in controversy. Can it be said that such a statement by the City Council violates the obligation of any contract so as to vest the Federal Courts with jurisdiction every time such a controversy arises.

But grant for the sake of argument, that the resolution had the force of an ordinance, it impaired no existing right of the plaintiff, deprived it of nothing without due process of law, and amounted to nothing more than notice by the City to the Telephone Company that its right to maintain and operate a local telephone exchange in the City would cease with the expiration of the rights conferred by Ordinance No. 135.

In other words, it was nothing more than a formal declaration of the City's position with reference to the controversy with the plaintiff in relation to the latter's rights under Ordinance No. 180.

St. Paul Gas & Light Co., vs. St. Paul, supra.

In the St. Paul Gas Light case, the court was considering the effect of an ordinance regulating the business as such by the City Council of Minneapolis, wherein the Gas Company was commanded to,

"Forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light
64 under contract with said company, and which said lamps have been discontinued by order of the board of public works."

And the declaration on the part of the City Council that they would not thereafter pay the Gas Company interest on the cost of the construction of the lamps which it was directed to remove, under the provisions of the Ordinance 1856, which granted the Gas Company power to construct the plant and supply the City and its inhabitants with illuminating gas, and in that action the Gas Company sought to enjoin the City from carrying into effect the latter Ordinance, and the Supreme Court held that the Ordinance complained of did not have the effect of impairing the obligations of the prior contract created by the Ordinance of 1856.

The pertinent part of the opinion of Mr. Justice White is as follows:

"If, then, there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions referred to. Now, it is apparent that the command given by the city to the Gas Company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of
65 the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligations remained wholly untouched by the order of removal. This being

true, the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provisions of the ordinance that the same result must follow. The other provision in question created no new right nor imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious then if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the City to enforce what it conceived to be its rights under the contract.

66 When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

"The formal repudiation by a municipality of its contract with a Water Works Company and its refusal to perform its obligations under it, cannot give rise to a suit under the Federal Constitution and the Court cannot take jurisdiction without reference to the citizenship of the parties."

Dawson vs. Columbia Co., 197 U. S., page 178; 49 L. Ed. 713.

The jurisdiction of the Federal Court of a suit by a street railway company to enjoin the enforcement
67 of a municipal ordinance as impairing the contract rights, cannot be sustained where such ordinance after reciting that question as to the Company's rights have been raised and orders it to remove its tracks and directs the city solicitor to take action to enforce the city's position, since such jurisdiction must contemplate enforcement by the city and not forceable removal of the tracks.

City of Des Moines vs. Des Moines City Railway Co., 214 U. S. 179; 53 L. Ed. 958.

In Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517-530 (48 L. Ed. 1102-1106) it was said:

"To constitute the impairment of a contract within the sense of the constitution, it is correctly argued, requires that some subsequent action by the state or under its authority should have been given effect as against the contract."

It was there held that intervening ordinances superseded the original ordinance of 1879, and that the ordinance of 1898 reducing the fare to four cents, impaired the right to charge five cents, conferred by the intervening ordinances which authorized the consolidation of the street car companies. There was clearly a violation of existing contractual rights in that case.

Hamilton Gas Light Co. vs. City of Hamilton,
68 146 U. S. 258; 36 L. Ed. 963-967.

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against the state laws impairing the obligation of contracts. * * * "

"Nor does every statute which affects the value of a contract impair its obligations. It is one of the contingencies which parties take now in making a large class of contracts, that they may be affected, in many ways by state and national legislation." Quoted from Curtis vs. Whitney, 80 U. S. 13; 20 L. Ed. 513-514.

"If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that *public grants, susceptible of two constructions, must receive the one most favorable to the public.*"

To sustain the jurisdiction of this court, plaintiff's counsel have cited the case of Iron Mountain Railway Co., vs. City of Memphis, 37 C. C. A. 435; 96 Fed. 113.

A careful examination of Judge Taft's opinion will show that the case involved a situation different than the one disclosed by this record. We do not question the rule announced in that opinion, to the effect that a city ordinance or resolution having the force of law, within the statute may have the effect of violating the obli-
69 gations of an existing contract, or violate the Fourteenth Amendment of the Constitution, by depriving a person of property without due process of law. We have heretofore quoted the words of Mr. Justice White in the St. Paul Gas Company case, which clearly express that principle. The points we make here are:

1. That this telephone resolution has not the dignity or force of law as would impair the obligations of an existing contract, or deprive plaintiff of any process of law, and in support of this we cite, City of Mitchell vs. Telephone Company, 25 S. D. 409-420.

2. Conceding for the purpose of argument, without admitting it, that the resolution in question has the force of law, still it does no more than declare the city's position upon the question at issue, and impairs no vested right, nor deprives it of anything it already possessed.

The distinction between the provisions of the resolution and the one under consideration in the Iron Mountain case; that is to say, the reason for the application of the rule contended for by the plaintiff in the latter, while it should not be applied to our case, is clearly pointed out by Mr. Justice Holmes in Des Moines vs. Des Moines City Ry. Co., supra.

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore the jurisdiction of the circuit court cannot be maintained.
70 Leaving on one side all question as to what can be done by resolution, as distinguished from ordi-

nance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

The opinion of Judge Taft is replete with expressions to the effect that the resolution in that case commanded the police force to take possession of the company's property; the following expressions clearly indicate that:

"The averment of the bill was that the council passed a resolution of forfeiture, and of the declaration of its purpose to take possession of the street, *intending to use the police force in enforcing such declaration.*"

71 "The Court below held, and, we think, rightly, that whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or not, an attempt by the city, through a resolution by its legislative council declaring the forfeiture on that account, and the *forcible taking possession,* would *together* constitute the taking of property of the railroad company without due process of law."

"Such forfeiture clauses always provide that upon the breach of the condition, the lessor or the grantor may re-enter upon the premises, and have the same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might rightfully *by force and arms* repossess himself of the estate, after a breach of the condition, if such repossession were resisted by the lessee or grantee. In Railroad Co. vs. Johnson, 119 U. S. 608, the Supreme Court laid down the rule which has been common law ever since the statute of

5 Rich. II, and was probably then only declaratory of the law that a lessor entitled to possession may acquire such possession by *lawful* entry, but that entry by *force* is not lawful."

"In such cases as the present, where resistance would create a riot, and lead to irreparable injuries so frequently resulting therefrom, equity will enjoin the
72 *threatened use of force* without respect to the question who has the right of possession." (Page 124.)

"With respect to the occupancy of a street, however, which it controls by virtue of being an agent of the state, and a trustee for the public, its action in depriving persons having vested property rights in the street will, *if without due process of law,* be state action, within the inhibition of the fourteenth amendment. For our present purpose it is not important whether this threatened taking possession of a street under a resolution *by force* is to be regarded as legislative or executive action, for either, as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law." (Page 125.)

These excerpts from the opinion clearly show that the element of force contemplated by the resolution in question was the controlling influence of the court upon the question of jurisdiction; that is, that it was the element of force contemplated by the resolution which the court thought deprived the company of its property without due process of law. In our case, as we have seen, the resolution notified the plaintiff company of the expiration of its rights under Ordinance 135, and that unless
73 it removed its poles, etc., the city "would take such steps as might be necessary to secure the immediate removal of said poles, etc."

There is nothing in our resolution, suggesting the use of force, or violence, or a riot, or as Mr. Justice Holmes puts it, that the city should take a posse and begin to pull up the poles.

If it should be contended that Judge Taft's opinion is not to be distinguished from the other cases, then it is

clearly in conflict with the views expressed by the Supreme Court and it must yield.

It is therefore respectfully submitted that no occasion exists in the present case for the exercise of Federal Jurisdiction and that the trial court erred in assuming such jurisdiction.

ORDINANCE NO. 180.

Aside from the question of jurisdiction, the main question for determination in the present case is whether or not Ordinance No. 180 of the City of Mitchell, gave to complainant a franchise to construct, operate and maintain a local telephone exchange in the City of Mitchell. The complainant contends that this ordinance gave it such rights, while the defendant claims that the ordinance in question gave to complainant, only the right to
74 construct and maintain a long distance telephone system as distinguished from a local exchange, and that the only right complainant had to operate and maintain a local exchange in said city was the right given in Ordinance No. 135. The defendant makes no claim to any right to remove the long distance system from the City but it is only the local exchange the defendant claims the right to disturb. By the term "local telephone exchange" as used in this brief is meant only those telephone wires, cables, poles, instruments and fixtures used in giving to the citizens of the defendant city facilities to communicate with each other by telephone within the corporate limits of the city, while by the term "long distance telephone" as used herein is meant only such lines whereby persons in the City of Mitchell can communicate by telephone with people outside of the corporate limits, or whereby people outside of the City can communicate with people residing within the city.

In support of defendant's contention that Ordinance No. 180 gives to complainant the right to operate and conduct only a long distance telephone system within and through defendant city, we desire to submit three general propositions, viz:

1. That the language of the ordinance requires such interpretation to be placed upon it.

75 2. That the circumstances surrounding its passage and the interpretation originally placed

upon the ordinance by both the complainant and the defendant strongly supports the defendant's contention.

3. That the Supreme Court of South Dakota, has determined the question in defendant's favor and such decision is binding upon this court.

Language of Ordinance No. 180

On this point, the Language of Ordinance No. 180, we desire to call the Court's attention to a few cardinal rules of interpretation.

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor."

Sec. 931, Revised Civil Code of 1903, South Dakota.

Municipal ordinances must be strictly construed against the party claiming the grant.

State ex rel Northwestern Tel. Ex. Co. vs. City of Thief River, et al, 113 N. W. 1057, Minn.

"Words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained."

Sec. 2443, Revised Civil Code of 1903, South Dakota.

"In the construction of a statute, the par-
76 ticular inquiry is not what is the abstract force of the words used, or what they *may* comprehend, but in what sense they were intended to be used as they are found in the act."

Lawrence County vs. Meade County, 6 S. D. 528, 62 N. W. 131.

The fundamental rule of interpretation applied to statutes, mandatory as well as directory, is that words in a statute, if of common use, are to be taken in their natural and ordinary sense, *without any forced or subtle construction* to limit or extend their import.

Landauer, et al vs. Conklin, et al, 3 S. D. 462, 54 N. W. 322.

If these rules are fairly applied in the interpretation of the ordinance in question there can be no escape from the interpretation contended for by defendant. If there is any doubt as to the scope of the grant contained in Ordinance No. 180, it must be construed strictly

against the complainant, but to give it the construction claimed by complainant would be reversing the rule and construing it strictly against the defendant, the grantor.

The term "long distance telephone" is not given a special construction by the South Dakota statutes, hence under Section 2443, Civil Code, they must be understood in their "ordinary sense", unless a contrary in-
77 tention *plainly appears*. They must be taken in their "natural and ordinary sense without any *forced* or subtle construction to limit or extend their import." That the term "long distance telephone" is in common use is well recognized.

City of Mitchell vs. Dakota Central Telephone Co., 25 S. D. 409: 127 N. W. 582.

State ex rel Northwestern Tel. Ex. Co. vs. City of Thief River Falls, et al, 113 N. W. 1057 (Minn.)

In construing a statute the intention of the legislature is to be collected from the words they employ and the intention is to be found "in the language actually used, interpreted according to its fair and obvious meaning."

Johnson vs. Southern Pac. Co., 196 U. S. 1.

United States vs. Harris, 177 U. S. 305.

The fair meaning of a statute must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the Court, would yet pretty plainly be beyond the limitation contained in the statute.

United States vs. St. Anthony Ry. Co., 192 U. S. 524.

Where a statute is expressed in plain and unambiguous terms, the legislature should be intended to mean what they have plainly expressed, and consequent-
78 ly no room is left for construction.

Northern Securities Co. vs. United States, 193 U. S. 197.

St. Paul Etc. R. Co. vs. Phelps, 137 U. S. 528.

Insurance Co. vs. Ritche, 5 Wall 541.

State Tonnage Tax Cases, 12 Wall, 204.

United States vs. Graham, 110 U. S. 219.

The legislative meaning is first to be sought in the words they have used, and if clear the letter of the law controls.

United States vs. Gooding, 12 Wheat, 460.

Lake County vs. Rollins, 130 U. S. 662.

Scott vs. Reid, 10 Pet. 524.

Pine vs. Chicago Title Etc. Co., 182 U. S. 438.

New Lamp Chimney Co. vs. Ansonia Brass, etc. Co. 91 U. S. 656.

Knights Templars, etc. Co. vs. Jarman, 187 U. S. 197.

White vs. United States, 191 U. S. 545.

"It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the Court to do so."

Bate Refrigerating Co. vs. Lutzberger, 157, U. S. 1.

The primary and general rule of statutory construc-
79 tion is that the intent of the lawmaker is to be found in the language he has used.

United States vs. Goldenberg, 168 U. S. 95.

Then what is the natural and ordinary meaning of this term? Can it be said to be the technical and restricted meaning sought to be adopted by the complainant? The very fact that complainant has felt it necessary to bring telephone experts from different parts of the middle western country to prove that a certain improved telephone transmitter was sometimes called a long distance telephone is proof in itself that the natural and ordinary meaning of the term under discussion is not as claimed by complainant. Why did not complainant go out upon the streets of defendant city or any other city and call in men to testify on this point? Simply because ninety-nine out of every hundred and probably more, would testify that they understood the term in the same sense as the defendant herein. So defendant insists that all of the evidence introduced by the complainant on the technical construction of telephone transmitters and their technical and trade names is but added proof that the term "long distance telephone" as used in Ordinance No. 180, should be construed to mean a telephone whereby communication may be had from one community to another, or from one town to another.

80 Complainant seeks to place a *"forced and subtle"* construction on the term, in order to ex-

tend its meaning. This is in direct conflict with the rule laid down in Landauer, et al, vs. Conklin, et al, 3 S. D. 462, 54 N. W. 322.

It may be argued that the use of the term "within and through" in the title of the ordinance shows an intention to grant a local franchise. This does not necessarily follow, and to our mind the use of the word "within" does not in any way support plaintiff's contention. It is not necessary to discard this word either. If long distance lines are to run through the city, what would be more natural than to say "within and through" for certainly the line could not run "through" the city without also running "within" the city. The two words must be taken together as a unit and so taken the use of the word "within" is no evidence of an intent to give a local franchise. Had the ordinance read "within *or* through" then such argument might have some weight.

Again, it will be contended that the insertion of the word "in" in the clause "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing *in,* near or at a distance from Mitchell," shows an intention to give a local
81 franchise.

In the first place, if the council intended to grant a local franchise, why was the term "long distance telephone" employed, both in the title and in the granting part of the ordinance? It surely was not necessary to use this term in order to secure the installation of the latest improved transmitter. It certainly seems strange that the ordinance should specifically describe a long distance telephone and then in order to show that the ordinance did not mean what it said, the word "in" should be employed to neutralize the language preceding it. Again, if by the term "long distance telephone" the so-called solid back transmitter only was meant, what would be the necessity of inserting the word "in"?

Because Ordinance No. 174, did not contain the word "in", it will be argued that the insertion of this word in Ordinance 180 has some important and magic significance. This does not necessarily follow, when we remember that it is the intention of the City Council that

must be ascertained and not the secret thoughts in the mind of Mr. Zietlow, the president of the plaintiff company. The Court's attention is called to the stipulated fact that the plaintiff company at the time Ordinance No. 174 was passed, was maintaining long distance
82 telephone lines within and through the city without any consent from the city.

It was not lawful for complainant to maintain and operate the long distance lines within the City of Mitchell without the consent of the municipal authorities thereof.

Art. X, Sec. 3, South Dakota Const.

Subd. 7, 9, 10, 17, Sec. 1229, Revised Pol. Code of South Dakota.

City of Mitchell, et al vs. Dakota Central Tel. Co., 25 S. D. 409, 127 N. W. 582.

Ordinance No. 180 was evidently passed to take the place of Ordinance No. 174, and we must assume that it was passed for the same purpose, viz: to give permission to maintain and operate the long distance telephone lines already constructed and to give permission to construct other long distance lines within and through said city.

In regard to the word "in" it seems to us that the logical construction would be to construe the word "in" as used in Ordinance No. 180, for the purpose of giving the "public in general," that is, the public outside of Mitchell, as distinguished from the people in Mitchell, facilities to communicate by long distance telephone with people residing *in* Mitchell, just as we must construe the purpose of the ordinance to be to give facilities to citizens *in* Mitchell to communicate by long distance tele-
83 phone with persons residing *"near* or *at a distance from Mitchell,"* for it cannot be said that one of the purposes of the ordinance was to give to the public in general or people living outside of Mitchell facilities to communicate with each other.

In 1904, complainant needed, and asked the city for a long distance telephone franchise, which was granted by an unsuspecting city council in the belief that the franchise meant what it said. Nine or ten years afterwards, when complainant needs a franchise for a local exchange it comes into a court of equity with the claim that the term "long distance telephone" was a trade name

of a certain new and improved transmitter which had superseded earlier forms of transmitters, and that the word "in" as used in the ordinance, shows an intent on the part of the city council to grant a local telephone franchise. This is, to say the least, an imposition, if not a fraud upon the public.

It occurs to us that this is a splendid opportunity to apply the rule "that when the meaning of a statute is doubtful, so that either of two constructions may with propriety be adopted by the Court, it is the duty of the Court to adopt that construction best calculated to protect the public against fraud and imposition, even though in individual instances such construction may work slight hardships."

Stern vs. Fargo, 18 N. D. 289, 26 L. R. A. (N.
84 S.) 665, 122 N. W. 403.

If either of the constructions contended for by the parties to this suit, can with propriety be adopted, it is the duty of the Court to adopt that construction which will protect the public against fraud and imposition, and complainant's construction of Ordinance No. 180 cannot be adopted in this case without creating an imposition upon the public. Neither can such construction be adopted without doing violence to the South Dakota statutory rule heretofore quoted that "every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor" and that "municipal ordinances must be strictly construed against the party claiming the grant."

The fact that in Ordinance No. 180, the City reserved the right to string wires on complainant's poles for fire alarm purposes is not indicative of the City's intent, at least to the extent that this reservation should be permitted to override the plain intent as indicated by the repeated use of the term "long distance telephone."

We are familiar with the case of City of Vermillion vs. The Northwestern Telephone Exchange Co., 189 Fed. 294. The reasoning on this point in that case does not appeal to us as sound. What that court said amounts simply to this "That if *we* (the Court) had been
85 drafting that resolution, we would have drafted it differently and designated the street upon which

the line should run." Now it is probable that no two persons would have worded the resolution in exactly the same way and because A did not word the resolution exactly as B would have done, is no proof that they did not mean the same thing. The argument that the right to use the poles for fire alarm purposes shows that a local franchise was intended is based upon a mere assumption. It is a well known fact that it is customary for cities to reserve this right to use all poles regardless of the number and location of such poles. Suppose the line ran only on one street through the city, the city could save the expense of erecting poles for fire alarm purposes on that one street. But even if complainant's reasoning on this point has any validity, it cannot apply in this case for the evidence shows that complainant has twenty-four long distance lines running through the city, and it cannot be said that there would be no object in the City reserving such right because it would run only on a few streets.

TESTIMONY

The complaint sought to influence the interpretation of Ordinance No. 180 by introducing extrinsic evidence as to the scope and meaning of the term "long distance telephone."

The testimony of M. L. Lane, Charles E. Hall,
86 J. L. W. Zietlow, Kempster B. Miller, T. C. Burns, Arthur Bersey Smith and J. O. Stockwell were taken in behalf of complainant on this point.

Transcript of Record, pages 102-117.

At the outset of our discussion of the evidence it is submitted that the language of Ordinance No. 180 is so plain and unambiguous that there is no room for construction, and that none of this evidence was competent on the question of the interpretation of the ordinance in question under the rule that extraneous evidence is not competent to show what was intended by an ordinance or a statute, but that such meaning must be ascertained from the language alone.

City of Vermillion vs. N. W. Tel. Co., 189 Fed. 289.

If this rule is to govern in the present case, then defendants objection to this line of testimony as shown on pages 103-110, of transcript of record, should have

been sustained and such evidence should not have been considered in the determination of this cause. The question of the competency or relevancy of this kind of testimony is raised by the Fifth to the Eleventh inclusive of defendant's assignment of errors which assignments are found on pages 137 to 141 of the Transcript of Record.

Assuming, however, that such evidence was competent for the purpose of interpreting Ordinance No. 180,
we desire to call the Court's attention to the nature
87 of this testimony. From this kind of testimony it
is apparent that the complainant rests its claim to a local telephone franchise under Ordinance No. 180, upon an improvement in the construction of telephone transmitters which was invented in 1892. It is claimed that this improved transmitter generally known to the trade as the "solid back," was frequently designated as a "long distance transmitter," and on the strength of this alleged designation of such improved transmitter, it is claimed that the term "long distance telephone" as used in Ordinance 180 had reference only to such improved transmitter. This is the basis of complainant's case in the present instance. This contention of the complainant, defendant earnestly resists.

In the first place, this claim lacks the ring of sincerity when Ordinance No. 135 is examined on the point as to what kind of telephone instruments are required by said ordinance. It will be noted that this ordinance does not specify any particular kind of telephone instruments which must be used under the privileges granted. It simply provides for the construction and operation of a telephone system within the city and the grantees were at liberty to use any kind of telephone instruments or apparatus which they thought best or saw fit to use so
long as they gave adequate service. It was there-
88 fore not at all necessary for the complainant to
secure and the city to grant a new franchise or consent to enable complainant to install this so-called "solid-back" or "long distance transmitter" in the local telephone system in the city. They had full authority under Ordinance No. 135 to use such transmitter or any other transmitter they deemed best. It would be absurd in the extreme to hold that a telephone company were

required to secure a new consent or a new franchise from the city every time the company desired to use any improved instrument or apparatus in their telephone system. If this were true, it would greatly retard, if not entirely stop, the development and improvement of the art of telephony. Again, if such were the law, the complainant would be in no position to invoke the aid of the courts in maintaining its present local telephone system in the City of Mitchell, contrary to the will of the city, because it is admitted that they have installed an "automatic" system which is claimed to be the very latest and most up-to-date system known in the telephone world. But where is complainant's consent from the city to install this automatic system? No such consent from the city to install this system has ever been given, and if it were required, complainant is in the city with its automatic system entirely without any right or franchise. Defendant herein does not claim that complainant had no right to install an automatic exchange under the terms of Ordinance No. 135, yet such must necessarily be
89 the logical result if complainant's contention is upheld. We admit that complainant had the right, under Ordinance No. 135, to install any new or improved telephone instruments or apparatus without securing a special consent thereto. They had the right to install the "solid back" transmitter, in fact, the testimony of Mr. Elce shows that about one-half of the transmitters in use in the city at the time he sold to complainant were solid back transmitters. *Transcript of Record, page 125.* They also had the right to install the automatic exchange as long as the life of Ordinance No. 135 lasted, or any other improved telephone instruments. But defendant does contend that if it were necessary for complainant to secure a new franchise to enable them to install the "solid back" transmitter, then it is also necessary for them to secure a new franchise to enable them to install the automatic exchange or any other new or improved instrument.

Therefore if the complainant had full power and authority under Ordinance No. 135 to install the "solid back" or so-called "long distance transmitter" it would be absurd to claim that the city authorities of the city of

Mitchell would grant a new franchise for the single purpose of granting to complainant a power they already had.

Much of the evidence submitted by the com-
90 plainant seeks to show the difference between the so-called "solid back" transmitter and the "Blake" transmitter. The testimony of Mr. Elce was to the effect that he had at no time while he owned the local telephone exchange in Mitchell, had any Blake transmitters in such exchange. *Transcript of Record, page 124, Folio 233.* The evidence relative to the "Blake" transmitter therefore becomes immaterial and irrelevant.

The substance of complainant's evidence on this point is that prior to the year 1892, the telephone transmitter in most common use was designated as the "Blake Transmitter." That in 1892 an improved transmitter was invented and patented which superseded the Blake transmitter for both local and long distance work as fast as the same could be supplied to the trade from 1893 to 1904, and that by the latter date the Blake transmitter had entirely gone out of use and was obsolete; that this new transmitter was merely an improvement over all former transmitters and marked one step in the evolution of the telephone industry, and that this transmitter was generally called the "solid back transmitter," and among telephone men it was sometimes called the "granular carbon type transmitter" and sometimes the "long distance transmitter," and sometimes the "solid back long dis-
tance transmitter" and at other times it was known
91 by various and other names without any references to its qualities as a long distance instrument.

That this solid back transmitter was substituted for the old transmitters as rapidly as the manufacturers could produce them both in local and long distance work. *Transcript of Record, pages 102-117.*

M. L. Lane testified for the complainant that his company, the Northwestern Telephone Company has 730 telephone exchanges and that in all of them this so-called "solid back" or "long distance transmitter" was used exclusively for both local and long distance work, and that he has not known of any Blake transmitters in use

anywhere since 1898. *Transcript of Record, page 104, Folio 198.*

Charles E. Hall for the complainant, testified, that he had been with the Iowa, the Nebraska and the Northwestern Telephone companies, and that in 1895, 1896 and 1897, they began to use the "solid back transmitter." That "we do not call the transmitter now in use the granulated carbon transmitter, but it is held out to the world as the 'solid back transmitter' as contra-distinguished from the one which had the vibrating effect, so we have always spoken of it as the 'solid back'." Also, that the solid back transmitter is in use all over the country in both local exchanges and long distance
92 lines, and the change to this type of transmitter was made as soon as it was perfected and could be supplied to the public. *Transcript of Record, page 106.*

J. L. W. Zietlow, the president of complainant company testified that he first knew of the solid back transmitter in 1890 to 1896, and from that time they were substituted for other transmitters as fast as they could be had. Also, that they were known by the trade name of "long distance telephone instruments." *Transcript of Record, page 107.* On cross examination Mr. Zietlow stated that whenever they put in a local exchange now, they put in solid back transmitters exclusively. That the Blake transmitter is obsolete. That none of his company's long distance lines through or from Mitchell into North Dakota, Minnesota, Iowa, or Nebraska, was continuous, but that if it were desired to send a message either from or through Mitchell to any point in some other state it is necessary to make one or more connections in the state outside of Mitchell. Also that his company had half a dozen long distance or toll stations in the city of Mitchell and that any citizen of Mitchell could use the long distance telephone from any one of those stations regardless of the local exchange; that the local automatic system or exchange in Mitchell could be removed without interfering with the long distance tele-
93 phone business passing through Mitchell; that the long distance wires in Mitchell terminate in the central exchange office and are not used for local messages at all. *Transcript of Record, pages 108-109.*

John E. Ostiline for the complainant, testified that the transmitter in use in 1906, was called the "solid back long distance transmitter" and that in the early days the instrument was designated the "Blake transmitter," and "long distance transmitter," and many called it the "solid back." That all transmitters now in use are of the solid back type, and this is used in all telephone work because it is the only kind they can get. *Transcript of Record, page 110.*

The testimony of Kempton B. Miller, T. C. Burns, Arthur Bessey Smith and J. O. Stockwell, is to the same general effect. *Transcript of Record, pages 110-117.*

The Court's attention is also called to the frequency which these witnesses referred to the so-called "long distance transmitter" as the "solid back transmitter," and the difficulty these witnesses had in referring to these instruments as "long distance transmitters."

On behalf of the defendant, Hiram D. Curier testified that in 1904, the transmitters on the market were sold for both local and long distance work, and that transmitters of the Blake designs were considered obso-
94 lete. *Transcript of Record, page 118.* Also, that the manufacturers of the solid back transmitter advertised that their transmitters could be used for long distance work, for the purpose of enlightening the subscribers that the instruments could be used for long distance purposes, if necessary. That the term "long distance" means to a subscriber remote points of communication because this phrase has been coined and is used to signify places far removed from each other. That in all operative companies, if a subscriber desires to talk out of town they ask for "long distance." *Transcript of Record, page 119, Folio 225.*

This testimony is also supported by the directions contained in Exhibit A, being the directions found in the complainant's telephone directory at Mitchell. *Transcript of Record, page 109.*

Alva J. Carter for the defendant testified that he is sales manager for the Kellogg Switchboard and Supply Company; that since 1900 he has not known of any telephone manufacturing company putting on the market two forms of telephone transmitters, one for local work

and one for long distance, nor does he know of any dealer or manufacturer that would consider putting in more than one kind of telephone that could be used for
95 both local exchange and long distance work. That he had not seen any telephone instruments offered on the market which were designated on the name plate as "long distance telephones." *Transcript of Record, page 121.*

Joseph B. Edwards for the defendant, testified that he had not at any time any knowledge of the term "long distance" being applied to designate a special type of transmitter, and that the Kellogg Switchboard and Supply Company had never made any distinction of transmitters for purely local or toll and long distance transmission, that is, his company manufactured only one type for all purposes. That the manufacture of Blake Transmitters were discontinued by 1898. That if the telephone companies had stated in their telephone directories that all "telephones are of modern equipment and style, it would have meant the same thing as designating all telephone instruments as long distance instruments. *Transcript of Record, pages 122-123.*

Mr. Elce, the grantee in Ordinance No. 135, testified for the defendant that he had several makes of telephones in his exchange, some Victors, a few Americans and Eurekas, and principally Kellogg phones when he sold out. That he had about 400 phones in his exchange, and that after the first year he had connection with the
96 long distance lines of the Dakota Central Telephone Lines, and that the instruments he used in his local exchange were used in talking over the long distance lines. That he had connections as far as Sioux City and Sioux Falls and Minneapolis, Minnesota. That the telephone instruments used in his local exchange were the latest instruments on the market at that time. That they had some little trouble in talking over long distance, due largely to faulty outside construction work. That in talking over the long distance lines his subscribers would just call up from their local station. That he did not have any Blake transmitters in his exchange, and that the transmitters he used were suitable for long distance work and that is what he bought them for. That the

Kellogg transmitters he used were called solid back transmitters, and was a granulated carbon type. That the phones purchased by him shortly before he sold out were not advertised or designated as long distance telephones. That the Victor transmitter first used was a granular carbon. That he had some subscribers who used the long distance a good deal and they used the same phone as other people used. That about half his instruments were solid back transmitters at the time he sold out. *Transcript of Record, pages 123-125.*

George E. Foster, A. J. King, J. E. Wells, and A. J. Curtis all testified in substance that they were members of the city council of the city of Mitchell at
97 the time of the passage of Ordinances No. 174 and 180. That they were not familiar with the various telephone instruments in use at that time, nor with the different kinds of transmitters. That they had never heard of the transmitter called the "solid back" and sometimes the "long distance transmitters." That they had never heard of any distinction between the telephone instruments used in local exchanges and in long distance lines. That their understanding of the term "long distance telephone" at that time was a telephone which connected the people of Mitchell with towns and points outside of the city. That they did not intend to grant a franchise to operate a local telephone exchange by the said ordinances. That they voted for the ordinances and that there were eight aldermen on the city council at that time. *Transcript of Record, pages 125-129.*

Mr. George A. Silsby testified that at the time of the passage of Ordinance No. 174 and 180 he was the Mayor of the City of Mitchell, that he was not at that time familiar with the various kinds of telephone instruments in use at that time; that he did not know the names of any transmitters or by what name they were generally known; that at the time of the passage of Ordinances No. 174 and 180, he did not know of the purchase of the local telephone exchange by the Dakota Central Tele-
98 phone Lines, and as far as he knew the members of the council did not know of it. That he understands the term, "long distance telephone" to mean telephone connections between different towns, and that was

the understanding of the city council at the time. That he did not intend to grant by said ordinances a franchise to operate a local telephone exchange. *Transcript of Record, pages 129-130.*

Defendant contends that all of the testimony that was offered by the complainant as well as that offered by defendant but strengthens its contention as to the interpretation of Ordinance No. 180. Certainly it cannot be claimed with any degree of success that the "ordinary sense" of the term "long distance telephone" as used in Ordinance No. 180, is what complainant claims it means, neither can it be said that it *plainly appears* from the ordinance or even from the evidence that it was intended by the City council that passed ordinance No. 180, that such term should be used in any but its ordinary sense. If then, the statutory rule of interpretation that "words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears," Sec. 2443, Revised Civil Code of 1903, of South Dakota, is to govern the interpretation of Ordinance No. 180 contended for by defendant, must necessarily be adopted.

The complainant is itself in the position of at-
99 tempting to place a *forced, subtle and strained* construction on the term "long distance telephone" by offering the testimony of a group of experts or at least experienced telephone men to the effect that this term was sometimes applied to an improved form of telephone transmitter among men engaged in the telephone trade and manufacture. The very fact that complainant felt compelled to offer the testimony of these experts is convincing proof that the "ordinary sense" of the term "long distance telephone" is not what complainant contends it means. Otherwise it would not have been necessary for complainant to secure the testimony of these experts, but it could have subpoened the ordinary business man on the street to substantiate its claim. But this was not done because counsel for complainant knew that such a course would but result in disaster to complainant's contention. We therefore insist that the interpretation of Ordinance No. 180 contended for by complainant will not only violate the above quoted statutory rules of construction, but that it will violate the rule that

in the construction of a statute, "the particular inquiry is not what is the abstract force of the words used, or what they *may* comprehend, but in what sense were they intended to be used as they are found in the act.

Lawrence County vs. Meade County, 6 S. D.
100 528, 62 N. W. 131.

It also violates the fundamental rule of statutory interpretation that words in a statute if of common use, are to be taken in their natural and ordinary sense, *without* any forced or subtle construction to limit or extend their import.

Laudauer, et al, vs. Conklin, et al, 3 S. D. 462; 54 N. W. 322 and cases heretofore cited.

We submit that if the testimony of complainant's witnesses does not make it clear that the term long distance telephone does not naturally and ordinarily mean a local telephone exchange with modern and improved transmitters, that the testimony of defendant's witnesses had made this contention clear beyond all cavil. When we take into consideration the testimony of Mr. Elce, the original grantee named in Ordinance No. 135, the untenableness of complainant's position becomes much made apparent. He says that he had no Blake transmitters in his exchange and that over half of the transmitters he used were solid back transmitters and that all of them were of the granular carbon type and suitable for long distance service. Under these circumstances complainant's contention that the city council intended to grant a local franchise by Ordinance No. 180 becomes absurd. If that were true, we would have the city
101 council granting a franchise for something that the city was already supplied with. Complainant contends that in order to get the improved solid back service, the city granted a local franchise when the city already actually had the improved solid back service. Again, it is agreed by all the witnesses that at the time of the passage of the ordinances in question that the Blake type of transmitter was obsolete and had been so for a number of years, and was no longer on the market. But complainant would have it that the city granted a local franchise in order to escape the use of the obsolete Blake transmitter which was no longer being made and which

was not on the market at all, and which according to the testimony of Mr. Elce, never had been used and was not being used at all in the city. Again, it is abundantly shown by the testimony that the Blake transmitter became obsolete prior to the passage of Ordinance No. 135, and that as early as 1893, the solid back was replacing the Blake as rapidly as they could be manufactured. This process was going on all over the country when the original franchise, Ordinance No. 135, was granted in 1898. This ordinance did not specify the use of the Blake transmitter, nor any other kind of obsolete and antiquated instrument. Therefore, was there any sane reason in 1904, for granting another local franchise in order to
102 avoid the use of instruments that were already obsolete and out of date in 1898?

But defendant's position on this point is made doubly secure by the testimony of the Mayor and four of the councilmen who passed the ordinances in question. We have one-half of the members of that council and the Mayor who presided over them, declaring that they had no acquaintance with any of the various forms of telephone transmitters and that they had never heard of the Blake, or the solid back, or the so-called long distance transmitter, and were not familiar with the names of the various instruments and that their understanding of the meaning of a long distance telephone is and was that it was a telephone between different towns. Now, if we are to determine the intention of the council that passed Ordinance No. 174 and No. 180, in the face of this testimony, how can it be said that the council intended to grant a local franchise by Ordinance No. 180, on the theory that the solid back transmitter was known as a long distance telephone, when the members of the council and the Mayor had never heard of the solid back or any of its numerous names? In the light of this testimony, complainant's contention reduces itself to this, that the city council of the city of Mitchell passed Ordinance No. 180, in order to get something which the council
103 had never heard of and did not know existed. The bare statement of the proposition shows its utter absurdity.

Again, the Mayor testified that he did not learn of the purchase of the local exchange by the Dakota Central Telephone Lines until after the passage of Ordinance No. 180 and as far as he knew, the other members of the council were kept in the same state of ignorance concerning that transaction. It cannot therefore be claimed here that the council intended to grant a new local franchise in order to enable complainant to operate the newly acquired property. If the council were ignorant of such purchase at the time of the passage of Ordinance No. 180, it will be necessary to assume that the council intended to grant a second local franchise in a city where there were a little over four hundred telephone users, in order to sustain complainant's position. Is such an assumption natural or reasonable?

It will undoubtedly be contended that the evidence of George E. Foster, A. J. Kings, J. E. Wells, A. J. Curtis, and George A. Silsby on what they understood by the meaning of the term "long distance telephone" is incompetent. This evidence was objected to at the time of taking the deposition of these witnesses and such objections were sustained and the correctness of the
104 Court's ruling on these points is raised by the twelfth to the twenty-eighth assignments of error. *Transcript of Record, pages 141-145.*

The Court will remember that these witnesses were members of the council and the mayor of the defendant city at the time of the passage of Ordinance No. 180. These men all testified without objection that they were not familiar with the various makes of transmitters or telephone instruments and had never heard of the "Blake" transmitter, or the "solid back" transmitter, or the so-called "long distance transmitter"; they were then asked as to what they understood by the term long distance telephone. This evidence goes to the question of the ordinary and natural meaning of the term "long distance telephone," and as such should be admitted. However, if this testimony is not admissable, then all of the testimony introduced by the complainant on the question of the meaning of the term "long distance telephone" should also be disregarded as the rule which will exclude this testimony of the defendant's witnesses is

equally applicable to the testimony offered by complainant on this point.

Even if it were admitted that the "solid back transmitter" was sometimes called long distance transmitter, that would not necessarily establish plaintiff's con-
105 tention. A telephone is composed of much more than a transmitter. That is but one of the parts of the whole telephone. There are other parts, such as the receiver, the line, wire, cables, poles, switchboards, ringing or calling devices, and batteries. The term "long distance transmitter" certainly does not include any of the above enumerated parts, and while the term "long distance transmitter" may have been used to designate one portion of the instruments and fixtures that go to make a telephone, yet a "long distance transmitter" is not a "long distance telephone." The latter is much more than the former, and when we speak of a long distance telephone we must necessarily include the receiver, the ringing device, the wires, cables, poles, batteries and other fixtures, and this therefore becomes an entirely different matter than a mere "long distance transmitter." For example, how can it be said that a wire running from one house to the house on the next lot is a "long distance" wire. In the very nature of the physical conditions, a telephone wire running from house to house in a small city of 6,500, such as Mitchell is, could not be a "long distance line" if the natural and ordinary meaning of that term is followed. How then could a local telephone system within the corporate limits of the city of Mitchell be a long distance telephone? It would
106 be a physical impossibility.

EXTRANEOUS CIRCUMSTANCES AND CONTEMPORANEOUS CONSTRUCTION

Circumstances surrounding the passage of Ordinance No. 180 and the interpretation heretofore placed upon it preclude the adoption of complainant's contention.

The construction placed upon a franchise by the grantee will be adopted by the court where it is contrary to the construction contended for in the particular case.

Kerz vs. Galena Water Co., 139 Ill., App. 598.

Doubtful statutes will be construed in the light of

the practical construction placed upon them by the public officers of the state, and acted upon by the people.

Gaar Scott & Co. vs. Sorum, 11 N. D. 164, 90 N. W. 799.

Fallipee vs. Witmayer, 9 S. D. 479, 70 N. W. 642.

State ex rel Edgarly vs. Currie, 3 N. D. 310, 55 N. W. 858.

The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the court, and is not to be disregarded without the most cogent and persuasive reasons.

Studebaker vs. Perry, 184 U. S. 258.

Pennoger vs. McConnoughty, 140 U. S. 1.

Stuart vs. Laird, 1 Cranch 299.

107 Cooper Queen Mining Co. vs. Arizona Board, 206 U. S. 474.

Edwards vs. Darby, 12 Wheat, 206.

United States vs. North Carolina, 6 Pet. 29.

Heath vs. Wallace, 138 U. S. 573.

Texas, etc. Ry Co. vs. Ailene Cotton Oil Co., 204 U. S. 426.

McKeen vs. Delaney, 5 Cranch 22.

Old Colony Trust Co. vs. Omaha, 230 U. S. 100.

One of the latest expressions of the Supreme Court especially applicable to this case is found in the opinion of Mr. Justice Van Deventer in the last case cited above. In that case the court was considering the effect of a resolution adopted by the City of Omaha, which declared a forfeiture of the rights of the Electric Light and Power Company, acquired under an ordinance of 1884. The question of jurisdiction was not involved in that case because the suit was instituted by the Old Colony Trust Company, a foreign corporation against the City of Omaha, and it was urged by the city that certain decisions of the Supreme Court of Nebraska were not well grounded, and upon this point the Supreme Court said:

"We need not say more of the first branch of the objection than that, as the decisions relate to matter of local law, namely, the construction of the state
108 Constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no

infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be."

The Court in this case in speaking of the effect of the interpretation of an ordinance by parties to litigation said:

"Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." (Citing several cases.)

If the practical interpretation of Ordinance 180 as adopted by the parties to this controversy is of great and controlling influence upon the court, is there any escape from the conclusion that the plaintiff considered that it derived its right to maintain a local telephone exchange in the City of Mitchell to the 11th day of May, 1913, under Ordinance 135?

The first telephone franchise granted in the City of Mitchell, South Dakota, was the franchise embodied in Ordinance No. 135 of said City, and set out in full in the stipulation of facts herein, *pages 67-69, Transcript*
109 *of Record.* This franchise was granted to F. B. Elce for a period of fifteen years from May 11th, 1898, and it is agreed that Mr. Elce duly accepted the terms and conditions of said ordinance, and that he built and operated a local telephone exchange under said ordinance, and continued to operate it until about the 25th day of May, 1904. *Transcript of Record, page 69.* At the above date, he sold out his interest in said telephone system and his rights and privileges to the Dakota Central Telephone Lines. *Transcript of Record, page 69-70 and 73.* And that on or about the 2nd day of October the said Dakota Central Telephone Lines sold said local telephone system together with its rights, franchises and privileges in the City of Mitchell, to the complainant herein. *Transcript of Record, page 73.* It is further agreed that sometime prior to the passage of Ordinances No. 174 and 180 set out on pages 71-72 of Transcript of Record, the Dakota Southern Telephone Company, a partnership constructed long distance telephone lines into the City of Mitchell, South Dakota, but that the rec-

ords of the City of Mitchell, South Dakota, does not show that any consent was ever given by the city to the construction or maintenance of said long distance telephone lines, or that the same was ever ratified by the city, and that sometime in 1903, the said Dakota Central
110 Telephone Lines purchased the said long distance telephone lines, and that about October 2, 1904, they were sold to the complainant herein, and that said complainant since that time has owned and operated said long distance lines in the city, and that the complainant has never secured the consent of the City of Mitchell to maintain said long distance lines within the corporate limits of the City, except as such consent may have been given by Ordinance No. 174 and Ordinance No. 180. *Transcript of Record, page 73.*

It is further agreed and stipulated that the complainant herein, owns and operates two separate and distinct telephone systems, namely, a local telephone exchange, and a long distance or toll telephone system, that said local telephone exchange is a separate and distinct telephone system or exchange from the long distance system, that the local telephone exchange furnishes facilities to the residents of the City of Mitchell to communicate with each other by telephone at a flat rate per month, and that the long distance system or toll lines are used exclusively in transmitting and receiving messages coming from outside of the city to or from inhabitants within the city, to people outside of the city, and that the wires or lines of the local exchange are used only for local telephone service within the
111 corporate limits of the city, except when they are connected to the long distance or toll line system for the purpose of receiving or transmitting long distance messages to or from the outside of the city; and that in case any local subscriber desires to use the long distance system he must first call up the central exchange and be connected to the long distance lines, and that the use of said long distance lines is charged for each time it is so used, the amount of the charge depending upon the distance and the length of the time used in transmitting such message. It is also agreed that a number of subscribers or patrons of the local telephone exchange, the exact num-

ber of which is not known, never use the long distance line. *Transcript of Record, pages 80-81.*

It is further agreed that from the time the complainant became the owner of the local telephone exchange, they complied with Section 3, of said Ordinance No. 135, which required the grantee or his assigns therein to provide a suitable and convenient place for a central office and to maintain such office in operation during the business hours of each week and at such other times as the business might demand. It is also further agreed that the complainant during the time up to May 11th, 1913, furnished three telephones to the City of Mitchell, free of charge, as required by Sec. 4, of said Ordinance
112 No 135. *Transcript of Record, page 79.*

It is further stipulated and agreed that the gross receipts from the local telephone exchange exceeded $2,400 for each of the years in which the complainant has owned said exchange, and that in accordance with the requirement of Section 4, of said Ordinance No. 135 for the year ending May 31, 1905, the complainant voluntarily and without objection paid to the city ten per cent of said gross receipts above $2,400 for that year, amounting to $300, and that for the year ending May 31st, 1906, the complainant voluntarily paid to the city the ten per cent of said gross receipts above $2,400 for that year, amounting to $412.30, and that thereafter the complainant refused to pay said ten per cent of the said gross receipts for the year ending May 31st, 1907, and 1908, and that thereupon the city of Mitchell sued said complainant for said gross earnings charges and recovered judgment against the complainant for same, and that some time during the year 1911, the complainant herein paid said judgment. And in addition thereto the complainant voluntarily and without objection paid to the city the ten per cent of the gross earnings above $2,400 for the year ending May 31st, 1909 and 1910, and that said complainant has refused to pay said gross earnings charges for the years ending May 31st, 1911 and 1912, and up to May 11th, 1913, when said ordinance expired, for the
113 reason that complainant claims that it is relieved from the payment of said charges by the provisions of Chapter 84, Laws of 1911, of the State of South

Dakota, and particularly Sec. 6 of said Chapter. *Transcript of Record, pages 79-80.*

It is further agreed that the complainant from the time it became the owner of said local telephone exchange and up to May 11th, 1913, complied with the provisions of Section 3, of said Ordinance No. 135, which provided that the maximum rent for said telephone established under said ordinance should not exceed $2.00 per month for each business telephone and $1.25 per month for each residence telephone. Also that on or about the 17th day of March, 1913, the complainant filed with the Board of Railroad Commissioners of the State of South Dakota a new schedule of rates for such Board's approval, said rates to take effect May 12, 1913, and that the city duly protested against the jurisdiction of said Board in said matter. *Transcript of Record, pages 77-79.*

It is further agreed that since 1910 the complainant refused to pay the gross earnings charge imposed by Ordinance No. 135, for the reason that complainant claims that it is relieved from the payment of said charge by the provisions of Chapter 84 of the Session Laws of 1911 of the State of South Dakota, and particular-
114 ly by Section 6 of said Chapter. *Transcript of Record, page 80, Folio 154.* Said Chapter 84 of the laws of 1911 is a statute providing for the assessment and taxation of telephone properties in the State of South Dakota and Section 6 thereof is as follows:

"All such telephone property so assessed by the state board of assessment and equalization shall be taxable upon said assessment at the same rates and for the same purposes as the property of individuals within such counties, cities, incorporated, towns, townships and lesser taxing districts. The proper officer of each taxing district shall certify to the county auditor the several rates of taxes to be levied in said district and the said county auditor shall extend the taxes against such assessment in a book to be called the "Telephone Tax Book" and shall transmit a copy of the rates so extended to each telephone company, which tax so levied and extended shall be in lieu of all other taxes whatsoever, including taxes on earnings that be now provided for by any law, ordinance,

or regulation of any city, town, county or township in this state."

From these stipulated facts, it is at once seen that at the time of the passage of Ordinance No. 180 the defendant city had one local telephone system operating under Ordinance No. 135 under which the city derived a reasonable compensation for the use of its streets and public grounds for telephone purposes, that this
115 local franchise had nine years yet to run. Also, that the complainant herein had a number of long distance telephone lines running into and through defendant city for which it had no franchise, and that to maintain such long distance lines in said city it was necessary to secure a franchise.

Article X, Sec. 3, South Dakota Constitution.

The City thereupon passed Ordinance No. 180, using the term "long distance telephones" in stating the purpose of the grant. Certainly these facts are convincing proof that the City did not intend to grant a franchise for a local exchange. It cannot be claimed that it would be reasonable for the defendant city to grant a franchise for a second local exchange and to give up its right to the gross earnings charge derived under Ordinance No. 135.

Again, the stipulated facts show that both the complainant and the defendant city up to the commencement of this action did not consider Ordinance No. 180 as granting a franchise for a local telephone exchange.

The complainant complied with all the terms of Ordinance No. 135 after the passage of Ordinance No. 180 up until the year 1908, when complainant refused to pay the gross earnings charge imposed by that ordinance on the grounds that Ordinance No. 180, and the resolution of April 10, 1907, relieved it from the further
116 payment of such charge, and also that the city did not have the power to impose such charge. *Transcript of Record, pages 87-89.* These contentions of complainant were rejected by the Supreme Court of South Dakota.

City of Mitchell et al vs. Dakota Central Tel. Co., 25 S. D. 409. 127 N. W. 582.

The stipulated facts further show that complainant voluntarily complied with all of the other conditions of

Ordinance No. 135 and that immediately upon the expiration of Ordinance No. 135 complainant applied to the Board of Railroad Commissioners of South Dakota for permission to change its rates from those specified in Ordinance No. 135. These facts show conclusively that both parties to this controversy considered that complainant's local telephone exchange was operated under Ordinance No. 135 and its long distance lines were being operated under Ordinance No. 180, and that the later ordinance did not give to complainant a franchise to operate a local exchange.

It is further stipulated that prior to the expiration of Ordinance No. 135, complainant unsuccessfully negotiated with defendant for a new local telephone exchange franchise. *Transcript of Record, pages 98-100.*

If complainant's claim that Ordinance No. 180 gave
117 it this privilege, then certainly there would be no necessity for it to secure a new franchise.

Again, the only ground given by complainant for not paying the gross earnings charge imposed by Ordinance No. 135, since 1910 was not because it had been relieved from such payment by Ordinance No. 180 but because Chapter 84, Laws of 1911, of South Dakota, had relieved it from such obligation. This contention has since been rejected by the Supreme Court of South Dakota, in City of Mitchell vs. Dakota Central Telephone Company, 36 S. D. 588, 156 N. W. 63.

It is therefore earnestly submitted that neither the language of Ordinance No. 180 nor the circumstances surrounding its passage nor the interpretation heretofore placed upon such ordinance will permit of the adoption of complainant's contention in this respect, and that to do so would in effect be the granting of a franchise for a local telephone exchange in Mitchell by this Court.

RES ADJUDICATA

In addition to the foregoing, the defendant insists that the question of the meaning and scope of Ordinance No. 180 has been determined by the Supreme Court of South Dakota, and it is therefore no longer an open question. This question was determined in the case here-

tofore referred to wherein defendant herein
118 sought to recover the gross earnings charge imposed by Ordinance No. 135, for the years ending May 31, 1907, and 1908. The pleadings in that case are set out in the stipulated facts. *Transcript of Record, pages 82-90.*

It was claimed in the Court below and will undoubtedly be claimed here that the issues in the present case are different from those in former case and that therefore this point was not decided.

From the pleadings, it will be observed that the main defense was Ordinance No. 180 and the resolution of April 10, 1907. It is true that the relief sought in that case is not the same as the relief sought in the present action, but we do not understand the rule to be that a prior adjudication cannot be set up as a defense except where the relief prayed for is identical in the various suits. If points actually litigated and decided are the same, it is immaterial as to whether the relief prayed for is identical. One of the main questions for decision in the former case was whether Ordinance No. 180 gave to complainant here a franchise to operate a local telephone system, because if that were true then Ordinance No. 180 had superseded Ordinance No. 135 and the City of Mitchell could not collect the gross earnings charge imposed by said Ordinance No. 135. There can be therefore
119 no escape from the fact that the interpretation, scope and meaning of Ordinance No. 180 was directly in issue in that litigation and the Supreme Court of South Dakota could not dispose of the case without deciding this question. The fact that this point was directly and necessarily in issue is further conclusively shown by the opinion of that court.

City of Mitchell et al vs. Dakota Central Telephone Co., 25 S. D. 409.

At page 414 the court said:

"It will thus be seen that the questions presented are: (1) Did the City of Mitchell have authority to grant to the predecessor of the defendant the right to establish its telephone system in the city of Mitchell upon the condition that it pay to the city 10 per cent of its gross proceeds over and above the sum specified? (2)

Did the subsequent ordinance No. 180, granting to the defendant the right to maintain a long distance telephone system within the City of Mitchell, have the effect of repealing the provisions relating to the payment of the 10 per cent of its gross proceeds as provided in section 4, of Ordinance No. 135?"

At page 419 the Court said:

"The further contention of respondent that Ordinance No. 180, granting to the defendant the privilege or franchise for installing a long distance tele-
120 phone plant, in effect repealed the provisions of Ordinance No. 135, did not, in our opinion, have the effect of repealing, qualifying, or modifying Ordinance No. 135, and the fact that the defendant paid the 10 per cent on its gross proceeds for two years subsequent to the adoption of Ordinance No. 180 clearly shows that it did not claim, for a time at least, that Ordinance No. 180 in any manner affected the prior ordinance. Repeals by implication are never favored, and this rule is too well settled to require the citation of authorities. There is clearly no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system. It may reasonably be presumed that the long distance telephone would not increase the servitude imposed upon the streets and alleys of the city; and, its object being to connect the residents of the city with the other towns and villages and other parts of the country, it might prove of sufficient benefit to the residents of the municipality to warrant the municipality in imposing no conditions upon the long distance telephone system, and hence its exemption from the imposition of any burden upon it in the way of compensation for the use of the streets and alleys of the city may have been very properly made."

Relative to the Resolution of April 10, 1907, it appears that the court below has adopted the con-
121 struction placed upon it by the Supreme Court of South Dakota, because the injunction granted therein only extends to the expiration of Ordinance No. 180, whereas the resolution in question has no time limit. This resolution is perhaps therefore not in issue before this court. However, we take the liberty of calling this

court's attention to the decision of the Supreme Court of South Dakota on the meaning and scope of this resolution. That court in 25 S. D. 409, at page 420 said:

"It is further contended by the respondent that the resolution adopted on April 10, 1907, had the effect of modifying or repealing Ordinance No. 135; but this contention is clearly untenable. The resolution reads as follows: "Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances.' It clearly appears from the phraseology of this resolution that it was simply intended to authorize the respondent to construct and maintain through and under the streets and public grounds of said city 'all conduits, manholes and cables
proper and necessary for supplying to the citizens
122 of said city and the public in general communication by telephone and other improve appliances.' It does not purport to repeal, amend, or modify ordinance No. 135 or ordinance No. 180 further than to allow the respondent the right to place its wires underground instead of stretching them upon poles in the streets; in other words, it was simply a permission to the respondent to place its wires underground where necessary in view of the increasing population and business of the City of Mitchell. It may be further stated that an ordinance of a municipality can only be repealed or changed by an ordinance and not by resolution. In 21 Am. & Eng. Ency. of Law, 1003, the rule is thus stated: 'The act which repeals a law must be of equal dignity with the act which establishes it; hence an ordinance can be repealed only by another ordinance, and not by a resolution or motion.' In 28 Cyc. 385, the learned author, in discussing the methods of repealing an ordinance, says: 'The repeal may not be effected by mere resolution or motion or by a void ordinance, but must be enacted in the manner required for passing a valid ordinance.' We are clearly of the

opinion, therefore, that the court's conclusions of law were erroneous, and that its conclusions and judgment should have been in favor of the appellants."

From the foregoing it is thus seen that the question of the meaning and scope of Ordinance No. 180 and of the Resolution of April 10, 1907, was necessarily
123 involved in the former case, and was definitely decided therein. And that inasmuch as the parties to that action were the same parties involved in the present case the decision of the Supreme Court of South Dakota should be respected by this court.

Appellant therefore respectfully submits that the trial court erred as set out in appellant's specifications of error and that the judgment herein should be reversed and the trial court directed to dismiss complainant's Bill of Complaint with costs to the defendant.

Respectfully submitted,

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Solicitors for Appellant.

(25,361)

SUPREME COURT OF THE UNITED STATES

NO. 531

THE CITY OF MITCHELL, APPELLANT,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA

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